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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 ADRIAN CONTRERAS-REBOLLAR,

10 Petitioner,

11 v.

12 JAMES KEY,

13 Respondent.

14 CASE NO. 3:15-CV-05471-BHS-JRC

15 REPORT AND RECOMMENDATION

16 NOTED: SEPTEMBER 23, 2016

17 The District Court has referred this petition for a writ of habeas corpus to United States
18 Magistrate Judge, J. Richard Creatura. The authority for the referral is 28 U.S.C. § 636(b)(1)(A)
19 and (B), and local Magistrate Judge Rules MJR3 and MJR4. Petitioner seeks relief from a state
20 conviction, thus, the petition is filed pursuant to 28 U.S.C. § 2254. The petition is mixed: the
21 first and second claims are exhausted while the third and fourth claims are unexhausted and
22 currently pending in Washington state court. Petitioner elected to voluntarily delete the two
23 unexhausted claims (grounds 3 and 4) and proceed with the two exhausted claims (grounds 1 and
24 2).

25 Although petitioner's co-counsel Jay Berneburg was excluded from the trial when a
26 prosecution witness, Regina Hernandez, testified that Mr. Berneburg told her what to say (which
27 subsequently lead to him becoming a witness to rebut her statement), petitioner was not denied a
28

1 fair trial and effective assistance of co-counsel when the trial court denied petitioner's motion for
2 a mistrial. Both parties focused on credibility throughout the trial -- Ms. Hernandez was a
3 habitual methamphetamine user who admitted to having a poor memory – and her testimony was
4 inconsistent. Defense counsel also made a tactical decision to use the self-defense jury
5 instruction rather than both self-defense and “defense of other” instructions. In light of all of the
6 corroborating evidence pointing to petitioner’s guilt, and the witness’s credibility, petitioner fails
7 to show that the rulings of the state court for the exhausted claims violated clearly established
8 federal law. Therefore, this Court recommends that grounds 1 and 2 of the petition be denied and
9 grounds 3 and 4 be dismissed without prejudice.

10 **DISCUSSION**

11 **A. Procedural Background**

12 Petitioner Adrian Contreras-Rebollar seeks § 2254 habeas relief from his convictions by
13 jury verdict of two counts of first-degree assault, with sentencing enhancements for the use of a
14 firearm. Dkt. 5. Petitioner also pleaded guilty to one count of second-degree unlawful possession
15 of a firearm. *Id.*

16 The petition was filed on July 20, 2015. Dkt. 15. In respondent’s original answer, filed on
17 October 2, 2015, respondent argued that the petition was a mixed petition and that petitioner’s
18 third and fourth grounds for relief were unexhausted. Dkt. 14. At the time of respondent’s
19 original answer, state remedies were still available. *See id.* Petitioner then sought two extensions
20 to file his response to respondent’s answer. Dkts. 17, 22. The Court granted petitioner’s
21 extensions. Dkt. 20, 24. Petitioner filed a traverse on February 10, 2016. Dkt. 25. Petitioner’s
22 traverse did not address whether he exhausted grounds three and four of his petition. *See* Dkt. 25.

1 On February 17, 2016, because neither party had informed the Court of the outcome of
2 petitioner's state actions, if any, with respect to grounds three and four, the Court ordered
3 respondent to supplement his answer and inform the Court if the arguments in the original
4 answer were still valid. Dkt. 26. On February 25, 2016, respondent filed his supplemental
5 answer and argued that grounds 3 and 4 were unexhausted but procedurally barred. Dkt. 27. On
6 March 3, 2016, petitioner filed an objection to the Court's order directing respondent to file a
7 supplemental answer. Dkt. 28. In the interests of justice, the Court entered an order allowing
8 petitioner to file a traverse to respondent's supplemental answer. Dkt. 29. On March 30, 2016,
9 petitioner filed his supplemental traverse. Dkt. 30. Respondent then filed a second supplemental
10 memorandum re: exhaustion of state remedies on July 8, 2016. Dkt. 35.

11 Respondent argues that in light of petitioner's April 21, 2016 judgment and sentence in
12 his case, petitioner is not time-barred from exhausting state court remedies on his unexhausted
13 claims 3 and 4. Dkt. 35 at 2-4. Petitioner's personal restraint petition remains pending and
14 petitioner has taken an appeal from the entry of the new judgment and sentence in his case. *Id.* at
15 2.

16 Petitioner then filed a supplemental memorandum on August 3, 2016 objecting to
17 respondent's request that his petition be dismissed without prejudice. Dkt. 36 at 1. Petitioner
18 requested that the Court allow him to voluntarily delete the two unexhausted claims in question
19 (grounds 3 and 4) and proceed with his two exhausted claims (grounds 1 and 2). *Id.*

20 In his federal habeas petition, petitioner raises the following claims: (1) whether the trial
21 court erred by denying a mistrial after the State's witness, Ms. Hernandez, testified that one of
22 petitioner's defense attorney's instructed her to lie, which violated petitioner's right to a fair trial
23 and his right to ineffective assistance of counsel; (2) whether defense counsel provided
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1 ineffective assistance of counsel at trial by failing to propose a “defense of another” jury
 2 instruction; (3) whether the prosecutor committed misconduct in the closing argument by
 3 commenting on petitioner’s post-arrest silence, his request for assistance of counsel, alleged
 4 “tailoring” of his trial testimony, vouching for the credibility of the State’s witnesses, and
 5 disparaging petitioner’s testimony; and (4) whether the cumulative effect of the errors in the first
 6 three habeas claims deprived petitioner of a fair trial. Dkt. 5 at 6-11.

7 Although petitioner’s first and second claims appear to be exhausted, petitioner’s third
 8 and fourth claims appear to be unexhausted and are currently pending in Washington state court.
 9 Therefore, his petition is a mixed petition. When faced with a mixed petition, a district court
 10 may generally exercise one of three options: (1) dismiss the mixed petition without prejudice to
 11 allow petitioner to present his unexhausted claims to the state court and then return to federal
 12 court to file a new habeas petition containing all of the claims; (2) stay the mixed petition to
 13 allow the petitioner to present his unexhausted claims to the state court and then return to federal
 14 court for review of his perfected petition; or (3) allow the petitioner to delete the unexhausted
 15 claims and to proceed with the remaining claims. *See Rhines v. Weber*, 544 U.S. 269, 274-79
 16 (2005). Petitioner has chosen the third option, which the undersigned recommends accepting,
 17 therefore, only grounds 1 and 2 will be discussed for purposes of this Report and
 18 Recommendation.

19 **B. State Procedural History**

20 **1. Direct Appeal**

21 Through counsel on February 29, 2008, and *pro se* on May 13, 2008, petitioner
 22 appealed to the Washington Court of Appeals. Dkt. 15, Exhibit 11 (Brief of Appellant), Exhibit
 23 12 (*Pro Se Statement of Additional Grounds*). Appellate counsel’s brief presented three issues,
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1 arguing (1) that the trial court abused its discretion and denied petitioner his rights to a fair trial
2 and effective assistance of counsel when it denied petitioner's motion for a mistrial after Regina
3 Hernandez claimed that defense counsel had instructed her to commit perjury; (2) the evidence
4 was insufficient to establish that the shooting was not in self-defense; and (3) that the trial court
5 erred in sentencing petitioner based on a criminal history and community custody status that
6 petitioner did not agree to and the State did not prove. Dkt. 15, Exhibit 11. In his *pro se*
7 statement of additional grounds, petitioner raised three additional issues, that trial counsel
8 provided ineffective assistance by: (1) failing to propose a "defense of another" instruction; (2)
9 proposing jury instructions on the crime of assault in which the phrase "great bodily harm" was
10 denied but also proposing instructions in which the phrase "great personal injury" was not
11 defined, and (3) proposing a "no duty to retreat" instruction. Dkt. 15, Exhibit 12. The
12 Washington Court of Appeals affirmed the convictions but remanded for resentencing. Dkt. 15,
13 Exhibit 14.

14 Petitioner, *pro se*, filed several motions for extensions to file a petition for review.
15 Dkt. 15, Exhibits 15-26. The first six motions were granted, but in granting the sixth motion, the
16 clerk of the Supreme Court cautioned petitioner that no further extensions would be allowed and
17 that his petition for review must be filed no later than November 30, 2009. Dkt. 15, Exhibit 26.
18 Petitioner then filed a seventh motion for extension, which the clerk denied and set the case for
19 consideration of a clerk's motion to dismiss. Dkt. 15, Exhibit 28.

20 On December 7, 2009, petitioner filed a motion to modify the clerk's ruling but did not
21 file a petition for review. Dkt. 15, Exhibit 29. On January 28, 2010, petitioner filed his petition
22 for review. Dkt. 15, Exhibit 31. On February 11, 2010, the Washington Supreme Court, without
23 comment, denied petitioner's motion to modify the clerk's ruling and granted the clerk's motion
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1 to dismiss. Dkt. 15, Exhibit 32. The Court of Appeals issued its mandate on April 14, 2010. Dkt.
 2 15, Exhibit 33.

3 **2. Appeal Following Remand and Personal Restraint Petition (Consolidated)**

4 On remand from the Washington Court of Appeals, the superior court imposed the same
 5 sentence it had imposed in 2007. Dkt. 15, Exhibit 34 at 15-16. Petitioner, through counsel,
 6 appealed the superior court's decision to the Washington Court of Appeals and argued that: (1)
 7 the resentencing court erred by denying his request for new counsel; (2) petitioner was entitled to
 8 have a jury, rather than the court, determine whether he was on community custody status when
 9 he committed the assaults and unlawful firearm possession; (3) the court miscalculated the date
 10 on which his term of community custody ended; (4) the court failed to prove that petitioner was
 11 on community custody at the time of the offense; and (5) that his attorney at the resentencing
 12 hearing was ineffective for failing to conduct an independent determination of the date on which
 13 petitioner's community custody ended. Dkt. 15, Exhibit 35.

14 Petitioner, *pro se*, filed a separate personal restraint petition raising two claims: (1)
 15 whether the trial court erred by excluding attorney Berneburg from the courtroom and (2)
 16 whether petitioner's attorney provided ineffective assistance of counsel at trial by failing to
 17 propose a "defense of another" jury instruction." Dkt. 15, Exhibits 36, 37. Petitioner's direct
 18 appeal and personal restraint petition were consolidated. Dkt. 15, Exhibit 38.

19 Petitioner then filed a supplemental grounds brief to his personal restraint petition raising
 20 several additional grounds for relief: (1) whether the trial court erred in admitting pre-*Miranda*
 21 statements he made to the arresting officer; (2) whether the prosecutor improperly commented on
 22 his right to remain silent; (3) whether he received ineffective assistance of counsel when counsel
 23 failed to propose a jury instruction regarding his statements to the arresting officer; (4) whether

1 the prosecutor committed misconduct in closing argument; and (5) whether cumulative error
 2 deprived petitioner of a fair trial. Dkt. 15, Exhibit 43.

3 The Washington Court of Appeals issued an unpublished opinion affirming petitioner's
 4 conviction but remanding for re-sentencing at which the State would be able to present evidence
 5 of petitioner's community custody status at the time of the crimes. Dkt. 15, Exhibit 44. The
 6 Washington Court of Appeals rejected the two claims in petitioner's personal restraint petition
 7 and dismissed his supplemental petition as untimely under RCW 10.73.090. Dkt. 15, Exhibit 44.

8 After several motions for extension, Dkt. 15, Exhibits 45-54, petitioner, proceeding *pro*
 9 *se*, sought discretionary review in the Washington Supreme Court of the Washington Court of
 10 Appeals' decision in his personal restraint petition. Dkt. 15, Exhibit 55. Petitioner argued that the
 11 Washington Court of Appeals erred by dismissing his supplemental claims as untimely and by
 12 denying his two original claims on the ground that the issues had been previously heard and
 13 determined. *Id.*

14 The Washington Supreme Court granted discretionary review and concluded that
 15 petitioner's supplemental claims were not time-barred under RCW 10.73.090. Dkt. 15, Exhibit
 16 56. The Washington Supreme Court held that the Washington Court of Appeals denial of
 17 petitioner's original claims did not merit review but remanded the case to the Washington Court
 18 of Appeals with instructions to address petitioner's supplemental claims on the merits. *Id.*

19 On remand, the parties submitted additional briefing. Dkt. 15, Exhibits 59-61. The
 20 Washington Court of Appeals issued an unpublished opinion addressing and rejecting each of
 21 petitioner's supplemental claims. Dkt. 15, Exhibit 62. Petitioner did not seek discretionary
 22 review in the Washington Supreme Court. The Washington Court of Appeals issued its mandate
 23 on January 9, 2015. Dkt. 15 Exhibit 63.

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1 **3. Second Personal Restraint Petition**

2 Petitioner filed his second personal restraint petition on December 17, 2015 and raised
 3 the following issues: (1) whether trial courts should be allowed to intervene any given time after
 4 an appeal has been initiated in order to correct trial mistakes at their own discretion; (2) whether
 5 the trial court erred when it failed to enter written findings to substantiate the record that
 6 petitioner was in community custody status; and (3) whether it is a miscarriage of justice when a
 7 trial court fails to consider its discretion to impose concurrent terms of confinement. Dkt. 27-1,
 8 Exhibit 1 at 11-12. It appears that petitioner's second personal restraint petition remains pending
 9 before the Washington state courts. Dkt. 27 at 3; Dkt. 35 at 2.

10 **C. Exhaustion--Grounds 1 and 2**

11 "[A] state prisoner must normally exhaust available state judicial remedies before a
 12 federal court will entertain his petition for habeas corpus." *Picard v. Connor*, 404 U.S. 270, 275
 13 (1971). Petitioner's claims will be considered exhausted only after "the state courts [have been
 14 afforded] a meaningful opportunity to consider allegations of legal error without interference
 15 from the federal judiciary." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986). "[S]tate prisoners must
 16 give the state courts one full opportunity to resolve any constitutional issues by invoking one
 17 complete round of the State's established appellate review." *O'Sullivan v. Boerckel*, 526 U.S.
 18 838, 845 (1999). Respondent concedes that petitioner properly exhausted grounds 1 and 2. Dkt.
 19 14 at 9.

20 **D. Grounds 3 and 4 Are Unexhausted But Not Procedurally Barred**

21 In his third claim, petitioner argues that the prosecutor committed misconduct in the
 22 closing argument by commenting on petitioner's post-arrest silence, his request for assistance of
 23 counsel, alleged "tailoring" of his trial testimony, vouching for the credibility of the State's
 24

1 witnesses, and disparaging petitioner's testimony. Dkt. 5 at 8. In his fourth claim, petitioner
 2 argues that the cumulative effect of the errors in the first three habeas claims deprived petitioner
 3 of a fair trial. Dkt. 5 at 10.

4 Previously, respondent argued that grounds 3 and 4 were procedurally barred under RCW
 5 10.73.090. Dkt. 27 at 3-4. However, after petitioner was re-sentenced on April 21, 2016,
 6 respondent changed his position, asserting that petitioner was not time-barred from exhausting
 7 state court remedies for Grounds 3 and 4. Dkt. 35 at 2-4. Based on the judgment and sentence
 8 entered on April 21, 2016 and petitioner's appeal from the entry of the new judgment and
 9 sentence in his case (Dkt. 35-1, Exhibit 4 at 29), it appears grounds 3 and 4 are unexhausted, but
 10 not procedurally barred.

11 A federal habeas petitioner must provide the state courts with a fair opportunity to correct
 12 alleged violations of federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Middleton v.*
 13 *Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985) (petitioner "fairly presented" the claim to the state
 14 Supreme Court even though the state court did not reach the argument on the merits). Petitioner
 15 bears the burden of proving he has exhausted available state remedies, and retains the burden to
 16 prove all facts relevant to the exhaustion requirement. *See Rose v. Lundy*, 455 U.S. 509, 520
 17 (1982); 28 U.S.C. § 2254(b)(1)(A).

18 Because petitioner has not proven that he has exhausted his available state remedies with
 19 respect to grounds 3 and 4, and because he still has the ability to present these claims to the
 20 Washington state courts, he presents this court with a mixed petition. Petitioner concedes that
 21 these grounds are unexhausted and requests to voluntarily dismiss grounds 3 and 4, while
 22 allowing the exhausted claims to proceed before the Court.

23 **E. Options for Mixed Petitions**

1 As noted above, a district court may generally exercise one of three options: (1) dismiss
 2 the mixed petition without prejudice; (2) stay the mixed petition to allow the petitioner to present
 3 his unexhausted claims to the state court; or (3) allow the petitioner to delete the unexhausted
 4 claims and to proceed with the remaining claims. *See Rhines*, 544 U.S. at 274-79. Respondent
 5 requests that the Court dismiss the petition without prejudice, and in the alternative, allow
 6 petitioner to elect to voluntarily delete the two unexhausted claims and proceed with the first two
 7 grounds. Petitioner requests that he be permitted to delete the unexhausted claims and move
 8 forward with the exhausted claims. If the Court were to now consider only the exhausted claims
 9 (grounds 1 and 2), petitioner could face procedural obstacles should he choose to bring a second
 10 or successive habeas petition to challenge his current conviction. *See Burton v. Stewart*, 549 U.S.
 11 147, 154 (2007) (noting that habeas petitioners proceeding with only exhausted claims may risk
 12 subjecting later petitions that raise new claims to rigorous procedural obstacles); *Cooper v.*
 13 *Calderon*, 274 F.3d 1270, 1272-73 (9th Cir. 2001) (per curiam) (noting that the relevant statutes
 14 greatly restrict the power of federal courts to award relief to state prisoners who file second or
 15 successive habeas corpus applications); 28 U.S.C. § 2244(b) (providing that a claim presented in
 16 a second or successive § 2254 habeas petition “shall” be dismissed unless certain substantive and
 17 procedural requirements are met).

18 Nevertheless, since both parties have agreed that this is the most appropriate way to deal
 19 with this case, and since it may take a considerable amount of time for all four claims to be fully
 20 exhausted, the undersigned recommends allowing petitioner to proceed with the exhausted
 21 claims and to dismiss without prejudice the unexhausted claims, as he has requested. Therefore,
 22 only grounds 1 and 2 will be discussed herein.

23 **F. BASIS FOR CUSTODY AND FACTS**

1 Petitioner was convicted by jury verdict of two counts of first-degree assault, with
 2 sentencing enhancements for the use of a firearm. Dkt. 15, Exhibits 10, 58. Petitioner also
 3 pleaded guilty to one count of second-degree unlawful possession of a firearm. *Id.* On February
 4 16, 2007, he was sentenced to 380 months of confinement. *Id.* On March 1, 2013, following a
 5 remand from the Washington Court of Appeals, the superior court conducted a re-sentencing
 6 hearing and imposed the same 380-month prison term. *Id.*

7 The Washington Court of Appeals summarized the facts in petitioner's case as
 8 follows:

9 On the afternoon of April 11, 2006, Contreras, Nicholas Solis, Regina Hernandez,
 10 and Ahria Kelly were at a friend's house in Tacoma where they drank alcohol and
 smoked methamphetamine. Contreras, Solis, Hernandez, and Kelly disagree as to
 some of what followed that evening.

11 Around five or six o'clock in the evening, Contreras, Solis, Hernandez, and Kelly
 12 left their friend's house and went to a place described as "Wolfie's alley," so Solis
 could pick up a vehicle. Report of Proceedings (RP) (Jan. 23, 2007) at 254.
 13 Contreras and Hernandez left Wolfie's alley to go drive around; Solis and Kelly
 followed in the car that Solis had just retrieved. Hernandez alleged that Contreras
 14 flagged Solis to stop, got out of his vehicle, and argued with Solis about a "sack
 of dope" and a Palm Pilot. RP (Jan. 23, 2007) at 259. According to Hernandez,
 15 Contreras returned to his vehicle, said, "[T]his mother fucker is getting on my
 nerves; I'm going to do him in[,] and retrieved a gun from the backseat of the
 16 car. RP (Jan. 23, 2007) at 261. After going back to Wolfie's alley,¹ Contreras and
 Hernandez subsequently drove to Yessica Rosas's house.

17 After arriving at Rosas's house, Rosas and Hernandez were talking in Rosas's
 18 bedroom when Contreras went outside to his car. Contreras returned wearing dark
 clothes and sunglasses, carrying a gun. Rosas testified that Contreras appeared
 19 nervous and looked like he was wearing a disguise. Rosas's father, Jose Rosas,
 heard people talking and he asked Hernandez and Contreras to leave. Jose
 20 testified that he watched Hernandez and Contreras drive away before returning to
 bed.

22 ¹ Hernandez claimed that, during their second visit to Wolfie's alley, Solis, while wearing
 23 a bandana over his face, pointed a gun at Contreras who responded by firing shots in Solis's
 direction. Kelly, however, testified that he did not see Solis wearing a bandana over his face or
 24 see Contreras and Solis pull guns on each other. [Footnote by the Washington Court of Appeals.]

Contreras sat in the driver's seat and Hernandez sat in the front passenger seat when they left Rosas's house. Hernandez testified that she was looking at CDs when she heard Contreras say, "[T]here those mother fuckers are." RP (Jan. 23, 2007) at 289. The two were only a short distance from Rosas's house when Contreras started shooting at the oncoming vehicle. After Contreras finished shooting, Hernandez heard him say, "I just dumped on those fools." RP (Jan. 23, 2007) at 290. Hernandez testified that Contreras did not appear afraid; instead, he appeared brave, calm, and cool. Further, Hernandez testified that she had her head down looking at CDs and did not see Solis's vehicle approach; she looked up after Contreras started shooting and saw only the taillights of Solis's vehicle. Contreras, however, relayed a different story at trial. Contreras claimed that he saw Solis's vehicle speed up and the headlights turn off. He also claimed to see Solis wearing a bandana² and raise the barrel of a gun. Based on this information, Contreras believed that Solis was preparing to commit a drive-by shooting. Contreras testified that he feared for his life, reached for his gun, ducked, and fired towards Solis's vehicle.

Solis was driving with Kelly in the passenger seat when Contreras shot at them. Kelly testified that he yelled “[d]uck” when he saw the flash of a gun firing from the driver’s window of a parked vehicle with no headlights. RP (Jan. 24, 2007) at 501. Solis did not see Contreras’s vehicle and only remembered seeing gunfire sparks at the time of the shooting. One bullet struck Kelly in the shoulder and at least one bullet struck Solis. As a result of the shooting, Solis is paralyzed from the chest down.

Shortly after the shooting, Kim Say-Ye was returning home when she saw a vehicle parked on the grass in front of her neighbor's house. The vehicle caught her attention because she saw shattered glass and because both the windshield wipers and headlights were on. She thought the driver was drunk and was about to call the police when Officer Timothy Caber showed up.

Caber, who had received the dispatch call for the shooting around 1:00 a.m., briefly spoke to Say-Ye when he arrived at the scene. Caber found the vehicle still running and stopped against landscaping railroad ties on the lawn. He also observed that the windshield wipers and headlights were on. Caber found Solis inside, slumped over; a rifle lay wedged between the driver and passenger seats with the barrel pointing toward the dash.

Edward Robinson, a firearm examiner at the Washington State Patrol Crime Laboratory, determined that the gun was a black powder rifle. Robinson received the rifle without a ram rod and without any wadding, projectiles, and gun powder

² Hernandez testified that Surenos tie bandanas over their faces when they are preparing to commit a drive-by shooting or assault. [Footnote by the Washington Court of Appeals.]

1 inside the rifle's chamber or otherwise in a container associated with the rifle.
 2 Solis testified that he traded dope for the rifle on the day of the shooting and that
 3 he thought the rifle was inoperable.

4 On April 12, 2006, the police arrested Contreras at a Motel 6. The State charged
 5 him with two counts of first degree assault, with firearm enhancements, and one
 6 count of second degree unlawful possession of a firearm. On November 30, 2006,
 7 defense counsel Jay Berneburg filed a notice of association in this case. Contreras
 8 hired Berneburg to supplement appointed counsel James Schoenberger at trial. At
 9 trial, Berneburg gave the opening statement and cross examined three witnesses.
 10 He also assisted Schoenberger with preparations outside of trial. On January 17,
 11 2007, Contreras pleaded guilty to second degree unlawful possession of a firearm.

12 On January 17, 2007, trial began. Both parties focused on credibility throughout
 13 the trial, as many of the witnesses were habitual methamphetamine users who
 14 admitted to having a poor memory.³ On January 23, 2007, Hernandez testified
 15 that she did not see the headlights on Solis's vehicle. When the prosecution
 16 questioned her, Hernandez acknowledged that her testimony conflicted with a
 17 statement she made to police officers shortly after the shooting. However, she
 18 claimed that Berneburg had told her the headlights were off. On direct, Hernandez
 19 denied that Berneburg told her to say the headlights were off, but on cross
 20 examination she claimed he had. On January 25, 2007, Contreras argued that
 21 Hernandez's testimony shattered his counsel's credibility and moved for a
 22 mistrial. The trial court denied the motion, but agreed to add Berneburg to
 23 Contreras's witness list for the sole purpose of rebutting Hernandez's allegation.
 24 Now a witness, the trial court excluded Berneburg from the courtroom. On
 25 February 1, 2007, the jury found Contreras guilty on both counts of first degree
 26 assault and found that he was armed with a firearm during the commission of both
 27 crimes.

28 Dkt. 15, Exhibit 14 at 2-5.

29 G. **EVIDENTIARY HEARING**

30 The decision to hold a hearing is committed to the Court's discretion. *Schrivo v.*
 31 *Landigan*, 550 U.S. 465, 473 (2007). “[A] federal court must consider whether such a hearing
 32 could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle
 33 the applicant to federal habeas relief.” *Landigan*, 550 U.S. at 474. In determining whether

34 ³ For example, Hernandez testified that she often hallucinates and hears things when she
 35 is “on a come-down” from taking drugs. RP (Jan. 23, 2007) at 241. [Footnote by the Court of
 36 Appeals.]

1 relief is available under 28 U.S.C. § 2254(d)(1), the Court's review is limited to the record before
 2 the state court. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). A hearing is not required if the
 3 allegations would not entitle petitioner to relief under 28 U.S.C. § 2254(d). *Landrigan*, 550 U.S.
 4 at 474. “It follows that if the record refutes the applicant’s factual allegations or otherwise
 5 precludes habeas relief, a district court is not required to hold an evidentiary hearing.” *Id.*; see
 6 also *Cullen*, 131 S. Ct. 1388 (2011). “[A]n evidentiary hearing is not required on issues that can
 7 be resolved by reference to the state court record. See *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th
 8 Cir. 1998).

9 Petitioner’s habeas claims raise only questions of law and may be resolved by a review of
 10 the existing state court record. Therefore, the Court finds it unnecessary to hold an evidentiary
 11 hearing.

12 **H. CLAIMS ON THE MERITS**

13 A habeas corpus petition shall not be granted with respect to any claim adjudicated on the
 14 merits in the state courts unless the adjudication either: (1) resulted in a decision that was
 15 contrary to, or involved an unreasonable application of, clearly established federal law, as
 16 determined by the Supreme Court; or (2) resulted in a decision that was based on an
 17 unreasonable determination of the facts in light of the evidence presented to the state courts. 28
 18 U.S.C. § 2254(d). Further, a determination of a factual issue by a state court shall be presumed
 19 correct, and the applicant has the burden of rebutting the presumption of correctness by clear and
 20 convincing evidence. 28 U.S.C. § 2254(e)(1).

21 1. *Ground 1 – The trial court erred by denying a mistrial after a State’s witness (Regina*
Hernandez) testified that defense co-counsel coached her testimony, which violated his
right to a fair trial and his right to effective assistance of counsel (Claim 1)

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1 In his first ground for relief, petitioner alleges that the trial court violated his Sixth
2 Amendment right to counsel when it excluded one of his defense attorneys, Jay Berneburg, from
3 part of the trial proceedings. Dkt. 5 at 5. Petitioner's memorandum of law provides more
4 information. Dkt. 5-2 at 35. Petitioner states that he retained Mr. Berneburg to join his case as
5 co-counsel. *Id.* At trial, Ms. Hernandez testified that the headlights were turned off on Solis' car.
6 *Id.* In her statement to police the day after the incident, Ms. Hernandez stated that she did not see
7 the car until after it passed. *Id.* Petitioner alleges that the prosecutor, Mr. Greer, went up to Ms.
8 Hernandez during a trial recess and conferred with Ms. Hernandez. *Id.* After the recess, on cross-
9 examination, Ms. Hernandez stated that Mr. Berneburg told her to say that Nicholas Solis'
10 headlights were turned off and that Mr. Berneburg was not present. *Id.* Respondent argues that
11 petitioner has not shown that the Washington state court's decision on this claim was contrary to
12 or an unreasonable application of clearly established federal law and that it was based on a
13 reasonable reading of the trial court record. Dkt. 14 at 22.

14 Respondent argues that Ms. Hernandez testified on direct that she did not see whether
15 Solis's headlights were on or off at the time of the shooting. Dkt. 14 at 14. On cross-
16 examination, Ms. Hernandez insisted that Mr. Berneburg had instructed her to testify that the
17 headlights were off at the time of the shooting (which would have supported petitioner's version
18 of events). *Id.* The defense moved for a mistrial and alternatively indicated it would call Mr.
19 Berneburg as a witness to rebut Ms. Hernandez's claim. *Id.* Respondent contends that the trial
20 court exercised its discretion and ruled that Mr. Berneburg could be called as a rebuttal witness
21 by the defense but that he would not be able to continue his participation in the trial or be present
22 in the courtroom. *Id.* Mr. Schoenberger, petitioner's appointed co-counsel, had handled the
23 majority of the defense duties up to that point and was able to conduct the remainder of the trial
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1 without any difficulty. *Id.* Finally, respondent argues that the trial court took the proper steps to
 2 ensure petitioner received a fair trial, as the Washington Court of Appeals concluded he had. *Id.*
 3 Moreover, it is respondent's position that Ms. Hernandez's unexpected claim that Mr. Berneburg
 4 had coached her did not render the trial fundamentally unfair. *Id.* Mr. Berneburg's absence from
 5 the remainder of the trial did not deny petitioner the right to effective assistance of counsel in
 6 light of Mr. Berneburg's minor role on the defense team. *Id.*

7 **a. The Law—Sixth Amendment Right to Counsel and Effectiveness of Counsel**

8 Petitioner alleges that the trial court violated his Sixth Amendment right to counsel when
 9 it excluded Mr. Berneburg from trial proceedings. Dkt. 5 at 5. Petitioner states in ground 1 of his
 10 petition that the trial court abused its discretion when it “took direct arbitrary action” against
 11 Petitioner's defense team that he had composed by excluding his retained co-counsel of choice,
 12 Mr. Berneburg. Petitioner states that he privately retained Mr. Berneburg with his family's
 13 personal expenses. Petitioner complains that Mr. Berneburg was excluded in the middle of trial
 14 from defending petitioner, without a proper adjudication by the trial court, before it took action.
 15 Dkt. 5 at 5.

16 The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall
 17 enjoy the right . . . to have the assistance of counsel for his defense.” U.S. Const. amend. VI. An
 18 element of this right is the defendant's “right to be represented by an otherwise qualified attorney
 19 whom that defendant can afford to hire, or who is willing to represent the defendant even though
 20 he is without funds.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (quoting
 21 *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989)); see also *Powell v.*
 22 *Alabama*, 287 U.S. 45, 53 (1932) (“It is hardly necessary to say that the right to counsel being
 23 conceded, a defendant should be afforded a fair opportunity to secure counsel of his own
 24

1 choice.”). The erroneous denial of the right to counsel of choice qualifies as structural error; that
 2 is, the defendant who establishes that his right to counsel of choice was violated need not
 3 demonstrate prejudice in order to be entitled to relief, as would a defendant who is claiming that
 4 counsel provided ineffective assistance. *Gonzalez-Lopez*, 548 U.S. at 150. “[T]he right at stake
 5 here is the right to counsel of choice, not the right to a fair trial; and that right was violated
 6 because the deprivation of counsel was erroneous. No additional showing of prejudice is
 7 required to make the violation ‘complete.’” *Id.* at 146.

8 However, the right to counsel of choice is “circumscribed in several important respects.”

9 *Wheat v. United States*, 486 U.S. 153, 159 (1988). A defendant does not have the right to be
 10 represented by (1) an attorney he cannot afford, (2) an attorney who is not willing to represent
 11 him, (3) an attorney who has a conflict of interest, or (4) a person (other than himself) who is not
 12 a member of the bar. *Id.* A trial court has “wide latitude in balancing the right to counsel of
 13 choice against the needs of fairness, … and against the demands of its calendar.” *Gonzalez-*
 14 *Lopez*, 548 U.S. at 152 (*citing Wheat*, 486 U.S. at 163-64; *Morris v. Slappy*, 461 U.S. 1, 11-12
 15 (1983)). Thus, trial courts have the discretion to make scheduling and other decisions that may
 16 have the effect of excluding a defendant’s first choice of counsel. *Id.*

17 Petitioner additionally argues that he was denied effective assistance of counsel when the
 18 trial court denied petitioner’s motion for a mistrial and Mr. Berneburg was excluded from
 19 participation in his trial. Dkt. 5-2 at 8. The primary question when reviewing a claim of
 20 ineffective assistance of counsel under the AEDPA is not whether counsel’s representation was
 21 deficient, or whether the state court erred in analyzing the claim, but whether the state court
 22 adjudication of the claim was unreasonable. *Landigan*, 550 U.S. at 472-473. Because counsel
 23 has wide latitude in deciding how best to represent a client, review of counsel’s representation is
 24

1 highly deferential and is “doubly deferential when it is conducted through the lens of federal
 2 habeas.” *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003).

3 To show ineffective assistance of counsel, a petitioner must satisfy a two-part standard.
 4 First, the petitioner must show counsel’s performance was so deficient that it “fell below an
 5 objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984).
 6 Second, the petitioner must show the deficient performance prejudiced the defense so “as to
 7 deprive the defendant of a fair trial, a trial whose result is unreasonable.” *Id.* The petitioner
 8 must satisfy both prongs to prove his claim of ineffective assistance of counsel. *Id.* at 697.

9 Under the first prong, the petitioner must specifically show “counsel made errors so
 10 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
 11 Amendment.” *Strickland*, 466 U.S. at 687. The proper measure of attorney conduct remains
 12 reasonableness under prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 521
 13 (2003). To avoid the temptation to second-guess counsel’s decisions, counsel is “‘strongly
 14 presumed to have rendered adequate assistance and made all significant decisions in the exercise
 15 of reasonable professional judgment.’” *Pinholster*, 131 S. Ct. at 1403 (*quoting Strickland*, 466
 16 U.S. at 690). The courts must “begin with the premise that ‘under the circumstances, the
 17 challenged action[s] might be considered sound trial strategy.’” *Id.* at 1404 (*quoting Strickland*,
 18 466 U.S. at 689).

19 Under the second prong, the petitioner must prove prejudice from counsel’s
 20 representation. *Pinholster*, 131 S. Ct. at 1403. It is not enough that counsel’s errors had “some
 21 conceivable effect on the outcome.” Rather, the petitioner must show “that, but for counsel’s
 22 unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 693-94.
 23
 24

1 “That requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.” *Pinholster*,
 2 131 S. Ct. at 1403 (*quoting Richter*, 131 S. Ct. at 791).

3 **b. The State Court’s Determination Was Reasonable**

4 On direct appeal, petitioner argued that the combined effect of the prejudice to defense
 5 counsel’s credibility and the “removal” of Mr. Berneburg denied petitioner his right to a fair trial
 6 and the effective assistance of counsel. Dkt. 15, Exhibit 11 at 11-15. In his appeal brief,
 7 petitioner argued:

8 From [Hernandez’s] testimony, the jury was given the impression that the defense
 9 attorneys, and by association Contreras, would lie and encourage perjury in order
 10 to win acquittal. By injecting the issue of defense counsel’s credibility into the
 11 case, Contreras was placed in the untenable position of choosing between
 12 allowing this impression to stay in the minds of the jury, or having to call one of
 13 his attorneys to testify at trial. ... Although the trial court gave a limiting
 14 instruction, it could not cure the enormous prejudice caused by Hernandez’s
 15 testimony and the prosecution’s attempts to show that the defense did encourage
 16 her to commit perjury.

17 *Id.* at 14-15.

18 The Washington Court of Appeals disagreed with petitioner’s assessment of the
 19 degree of prejudice stemming from Ms. Hernandez’s testimony and rejected his argument that
 20 the prejudice was incurable:

21 Trial courts should grant a mistrial “only when the defendant has been so
 22 prejudiced that nothing short of a new trial can insure that [the] defendant will be
 23 tried fairly.” ... The trial judge is best situated to assess the prejudice of a
 24 statement. ... When an irregularity occurs at trial, we review the irregularity to
 determine whether it may have influenced the jury. ... To determine the effect of
 the trial irregularity, we examine (1) the seriousness of the irregularity; (2)
 whether the irregularity was cumulative of other evidence properly admitted; and
 (3) whether the trial court could cure the irregularity by an instruction to disregard
 the remark

25 Here, Berneburg said in his opening statement that Solis’s vehicle’s headlights
 26 were off, but Hernandez testified on cross that Berneburg told her to say that
 27 Solis’s vehicle’s headlights were off. ... Contreras argues that Hernandez’s
 28 allegations made the jury question Berneburg’s credibility. However, in denying

1 Contreras's motion for a mistrial, the trial court found that the issue was
 2 Hernandez's credibility, not Berneburg's. "The material issue, it seems to me, is
 3 Ms. Hernandez and her credibility and what she saw I don't think anybody is
 4 accusing Mr. Berneburg ... [of] committing a felony." RP (Jan. 25, 2007) at 682.
 5 Notably, the record supports the trial court's finding: on direct, Hernandez
 6 testified that Berneburg *did not* tell her to testify that Solis's headlights were off,
 7 whereas on cross, she testified that Berneburg *told* her to testify that Solis's
 headlights were off. Contreras cannot show that there is a substantial likelihood
 that Hernandez's testimony prejudiced him to such an extent that nothing short of
 a new trial could ensure fairness. ... In this case, even if Hernandez's testimony
 slightly prejudiced Contreras, the trial court took appropriate curative steps by
 permitting Berneburg to testify to rebut Hernandez's allegation and by limiting
 Berneburg's testimony with the following instruction:

8 Before the testimony of Mr. Berneburg is allowed, the Court
 9 advises you that you may consider the testimony regarding Mr.
 Berneburg's contact with Regina Hernandez only for the purpose
 10 of assessing her credibility. You must not consider the testimony
 for any other purpose. RP (Jan. 25, 2007) at 812-13.

11 Berneburg's testimony served to rebut Hernandez's allegation and the instruction
 12 limited the scope of his testimony to the purpose of assessing Hernandez's
 13 credibility. Juries are presumed to follow the trial court's instructions. ... Thus,
 the trial court's curative steps cured any prejudice Hernandez's testimony may
 have created, further supporting our conclusion that Contreras received a fair trial.

14 Dkt. 15, Exhibit 14 at 6, 8-9 (emphasis in original) (footnotes and citations omitted).

15 The Washington Court of Appeals also rejected petitioner's claim that the trial court's
 16 actions denied him the right to effective assistance of counsel:

17 Contreras also argues that the trial court denied his right to effective assistance of
 18 counsel in excluding Berneburg from the courtroom. The constitutional right to
 19 counsel promises a defendant an attorney who can provide "reasonably effective
 20 assistance." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.
 21 Ed. 2d 674 (1984). We give exceptional deference to counsel's decisions and such
 22 decisions cannot serve as a basis for an ineffective assistance of counsel claim if
 23 counsel's decisions are a legitimate trial strategy or tactic. *State v. McNeal*, 145
 Wn.2d 352, 362, 37 P.3d 280 (2002). Here, Schoenberger represented Contreras
 at all times during the trial, and the trial court only excluded Berneburg when the
 defense requested that the trial court add him to the witness list. The defense
 sought Berneburg as a witness to rebut Hernandez's testimony, which was a
 legitimate trial strategy and this strategic action did not deny Contreras his right to
 effective assistance of counsel.

24 Dkt. 15, Exhibit 14 at 9-10.

1 **i. Trial Record Supporting State Court's Denial of Motion For A Mistrial**

2 Respondent argues that the Court of Appeals' decision on claim 1 (ground 1) was neither
 3 contrary to nor an unreasonable application of clearly established United States Supreme Court
 4 precedent, and it was based on a reasonable reading of the trial record. Dkt. 14 at 22. Respondent
 5 argues the trial judge observed that Ms. Hernandez's claim (that she was coached) bore on her
 6 credibility, not Berneburg's. Ms. Hernandez testified on direct examination that Mr. Berneburg
 7 did not tell her to testify that Solis's headlights were off, yet on cross-examination she insisted
 8 that Berneburg did tell her to testify that Solis's headlights were off. *See* Dkt. 15, Exhibit 4 at
 9 299-300 (direct) compared with *id.* at 304-06 (cross).

10 The relevant trial court record considered by the Washington State Court of Appeals
 11 focused on Ms. Hernandez's testimony ,as a prosecution witness at trial. At the time of her
 12 testimony, Ms. Hernandez was a state prisoner and was temporarily housed at the jail during
 13 petitioner's trial. Dkt. 15, Exhibit 4 at 227-28. The prosecutor questioned her extensively about
 14 her and petitioner's activities on April 11-12, 2006. *Id.* at 229-304. She described the moments
 15 leading up to the shooting, when she and petitioner were seated in his car:

16 [Prosecutor]: And you see a car coming?
 17 [Hernandez]: Coming.
 18 Q: Then what happens?
 19 A: The headlights were out, but the other side of the lights were on. You
 20 understand?
 21 Q: Well, you tell me.
 22 A: Like these are the main lights. They're off, but the outside are on, like the
 23 single lights, and I wasn't giving the car too much attention because I'm looking
 24 at the CD's, but all I remember is Adrian saying, "There those mother fuckers
 25 are," and I heard gunshots. And then I looked back out the window, and the car
 26 brakes were on, and the car slowed down. I seen no heads or nothing, but to be
 27 honest, I thought it was somebody like an older person. I didn't know who it was.

28 Dkt. 15, Exhibit 4 at 289.

29 During a recess, Ms. Hernandez was provided a copy of the statement she gave to the

1 police the day after the shooting. *Id.* at 297-98. When she resumed the witness stand, the direct
2 examination continued and the prosecutor questioned her again, without any objections from the
3 defense, about whether the headlights on Solis's car were on or off immediately before the
4 shooting:

5 [Prosecutor]: Are there things in that statement that are different than what you
testified to this morning?

6 [Hernandez]: A little bit.

7 Q: One thing I want to bring up first is the issue of whether you saw headlights on
the approaching vehicle as you described. Did you actually see them?

8 A: I didn't see the vehicle until I looked back at the brake lights.

Q: Why did you say earlier that you actually saw the side lights?

A: I wasn't –

Q: The defense attorney?

A: Yes, he told me that when he came to visit.

Q: When did he visit you?

A: The day before yesterday.

Q: He didn't tell you to say that, did he?

A: No.

Q: Did he tell you –

A: That the lights were off.

Q: And my question then is: What is the truth, what he told you –

A: The truth is what I said in the statement. I didn't see the car coming; I only
seen the brake lights.

Dkt. 15, Exhibit 4 at 299-300.

Next, Ms. Hernandez was cross-examined by defense counsel Schoenberger, who
questioned Hernandez about her recent interview with Schoenberger and co-counsel Berneburg
at the jail:

[Defense counsel]: We met this last Sunday didn't we?

[Hernandez]: Mm-hmm.

Q: And Mr. Berneburg and I came and talked with you, didn't we?

A: Yes, sir.

Q: And we didn't tell you the headlights were off, did we? We said were the
headlights on or off; isn't that right?

A: Mr. Berneburg told me that the headlights were off and to say that when I got to
court.

Q: Didn't you respond that when the lights are off they do that when they're doing a
drive-by shooting?

1 A: Yes I did say that. You asked me what does the term mean.

2 Q: What does that term mean?

3 A: When they drive with their lights off and I answered your question.

4 Q: But it's your testimony that Mr. Berneburg told you to say that the lights were
5 off?

6 A: Yes, sir.

7 Q: Didn't Mr. Berneburg and I make a big point of telling you that it's important
8 that you just tell the truth and we'll deal with that?

9 A: Mm-hmm.

10 Q: And we did tell you that, didn't we?

11 A: Yes, sir to tell the truth.

12 Q: Several times?

13 A: Yes.

14 Q: So you told us as you told the officers that you were looking through CD's and
15 you didn't see the car until there was a shooting?

16 A: That's the truth.

17 Q: So yet you're telling the jury today that Mr. Berneburg told you to say –

18 A: That the lights were off, yes, sir.

19 Q: And you're pretty sure that he told you to say that?

20 A: Yes.

21 Dkt. 15, Exhibit 4 at 304-06.

22 Mr. Schoenberger requested – two days after Ms. Hernandez's testimony—that he be
23 allowed to call Mr. Berneburg as a witness to rebut Ms. Hernandez's assertion that she was
24 coached. Dkt. 15, Exhibit 6 at 674. The trial court allowed him to do so but also ruled that Mr.
Berneburg, as a potential witness, would not be allowed to further participate in the trial. Dkt. 14
at 22. Respondent argues that this was proper and that no clearly established Supreme Court
precedent obligated the trial court to order a mistrial under these circumstances or to allow the
attorney (or both attorneys) to testify as a witness while simultaneously continuing to serve as an
advocate. *Id.* at 22-23.

25 The state court also considered other evidence relating to Solis's headlights on the night
26 of the shooting. For example, other prosecution witnesses had testified that Solis's headlights
27 were still on at the time after the shooting when his car drifted into a nearby yard. See Dkt. 15,
28 Exhibit 3 at 103 (testimony of Kim Say-Ye, who lived next door to the residence where the car

1 was found); *id.* at 195-96 (testimony of Timothy Caber, the first police officer on the scene). In
 2 contrast, petitioner claimed that Solis turned his headlights off as he approached petitioner's
 3 vehicle, which he interpreted to mean that a drive-by shooting was about to occur. Dkt. 15,
 4 Exhibit 7 at 872.

5 In closing argument, the prosecutor touched upon Ms. Hernandez's testimony (*see* Dkt.
 6 15, Exhibit 8 at 991-93), but he did not refer to her claim that Mr. Berneburg told her what to
 7 say about the headlights. Defense counsel told the jury that whether the headlights were on or off
 8 was not significant to petitioner's claim of self-defense: "Don't be taken in by this headlight
 9 thing. It might be a red herring. Maybe the headlights were on the whole time." Dkt. 15, Exhibit
 10 8 at 1003-04. The prosecutor disagreed and argued in rebuttal that the headlight issue was not a
 11 red herring, *id.* at 1018-19, but he again refrained from repeating Ms. Hernandez's allegation
 12 about Mr. Berneburg coaching her.

13 **ii. Berneburg's Participation Was Limited**

14 From the beginning, Mr. Berneburg's role in petitioner's defense at trial appeared to be a
 15 limited one and that Mr. Schoenberger was the primary counsel for petitioner. For instance, Mr.
 16 Berneburg was not present for any of the pretrial proceedings or *voir dire* on January 17 and 18,
 17 2007. *See* Dkt. 15, Exhibits 1 and 2. Mr. Schoenberger advised the trial court on January 17 that
 18 "Mr. Berneburg has come in and associated as co-counsel. He is, unfortunately, conducting a
 19 trial as we speak in Lewis County and expects to be done today or tomorrow by noon, and Mr.
 20 Rebollar has elected to proceed without Mr. Berneburg until he can join us at whatever time he's
 21 able to." Dkt. 15, Exhibit 1 at 3. Mr. Berneburg was not present in court during Ms. Hernandez's
 22 testimony on January 23, 2007. On January 23, 2007, Mr. Schoenberger explained to the court
 23 (immediately prior to Ms. Hernandez's testimony) that Mr. Berneburg would thereafter not be a
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1 participant in the trial at all: "Mr. Berneburg's role will most likely be in the background now
 2 and probably will not be appearing in court." Dkt. 15, Exhibit 4 at 226. Mr. Berneburg had been
 3 present the day before (January 22) and conducted the cross-examination of three of the State's
 4 witnesses (*see* Dkt. 15, Exhibit 3 at 155-57, 165-71, and 179-82), but he was not in attendance
 5 again at trial until January 25, 2007, the day the defense brought its mistrial motion.

6 On January 25, 2007, two days after Hernandez's testimony, the defense moved for a
 7 mistrial based on Ms. Hernandez's claim on cross-examination that Mr. Berneburg told her to
 8 say the lights were out on Solis's vehicle. Dkt. 15, Exhibit 6 at 674. The defense wanted to call
 9 Mr. Berneburg as a defense witness to rebut Ms. Hernandez's testimony and also to call Mr.
 10 Schoenberger to endorse Mr. Berneburg's rebuttal testimony. *Id.* (Mr. Schoenberger stated:
 11 "[W]e can't let the jury have this impression that defense counsel have in any way tampered with
 12 any witness, let alone this one. I think it taints the entire case."). *Id.*

13 The prosecutor recommended that instead of a mistrial, the court could give a curative
 14 instruction advising the jury to disregard that part of Ms. Hernandez's testimony in which she
 15 stated that Mr. Berneburg had told her how she should testify. *Id.* at 678-79. The court denied
 16 defense's request for a mistrial but indicated that Mr. Berneburg would be allowed to testify in
 17 rebuttal. *Id.* at 682. The court noted that the real issue was Mr. Hernandez's credibility, not
 18 Berneburg's. *Id.* ("The material issue, it seems to me, is Ms. Hernandez and her credibility and
 19 what she saw."). However, because he would be a witness in the case, the court indicated Mr.
 20 Berneburg would be treated as any other potential witness and excluded him from the courtroom.
 21 *Id.* at 683-84.

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1 On January 29, 2007, Mr. Berneburg testified about what Ms. Hernandez told him during
 2 his pretrial interview with Ms. Hernandez at the county jail. Dkt. 15, Exhibit 7 at 812-29.

3 **iii. Limiting Instruction Prior to Berneburg's Testimony**

4 Mr. Berneburg testified that during his pretrial interview with Ms. Hernandez at the
 5 county jail, she told him that the headlights on Solis's car were off at the time of the shooting.
 6 Dkt. 15, Exhibit 7 at 815. Prior to Mr. Berneburg's testimony, the court gave the jury the
 7 following limiting instruction: "Before the testimony of Mr. Berneburg is allowed, the Court
 8 advises you that you may consider the testimony regarding Mr. Berneburg's contact with Regina
 9 Hernandez only for the purpose of assessing her credibility. You must not consider the testimony
 10 for any other purpose." *Id.* at 812-13. The court instructed the jury again at the conclusion of trial
 11 that "you may consider the testimony regarding Mr. Berneburg's contact with Regina Hernandez
 12 only for the purpose of assessing her credibility. You must not consider the testimony for any
 13 other purpose." See Dkt. 15, Exhibit 59 at App. G, Instruction No. 4.

14 **c. Conclusion Regarding the Merits of Claim 1**

15 The Court of Appeals' decision on ground 1 (claim 1) was neither contrary to nor an
 16 unreasonable application of clearly established United States Supreme Court precedent, and it
 17 was based on a reasonable reading of the trial record. The trial judge correctly observed that Ms.
 18 Hernandez's claim that she was coached bore on her credibility, not Mr. Berneburg's. Ms.
 19 Hernandez's testimony on direct and cross was inconsistent. Ms. Hernandez was a habitual
 20 methamphetamine user who admitted to having a poor memory. Dkt. 15, Exhibit 2 at 238, 241.
 21 Ms. Hernandez testified that she often hallucinates and hears things when she is "on a come-
 22 down" from taking drugs. *Id.* at 241. The trial judge properly excluded Mr. Berneburg, who
 23 played a minor role on the defense team compared to Mr. Schoenberger. Finally, the trial judge
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1 properly instructed the jury with a limiting instruction directing the jury to limit the scope of Mr.
2 Berneburg's testimony to the purpose of assessing Ms. Hernandez's credibility. This was an
3 appropriate instruction tailored to the circumstances of petitioner's case.

4 As to petitioner's claim that it was ineffective assistance of counsel to exclude Mr.
5 Berneburg from the case, the Court finds the state court's determination, that it was not
6 ineffectiveness but rather a legitimate trial strategy, was a reasonable determination. The defense
7 sought Mr. Berneburg as a witness to rebut Ms. Hernandez's testimony, which was a legitimate
8 trial strategy that did not deny petitioner his right to effective assistance of counsel. Mr.
9 Berneburg's role was minor and the petitioner has not shown that Mr. Schoenberger's
10 performance (without Mr. Berneburg's presence for most of pretrial and trial proceedings) was
11 so deficient that it "fell below an objective standard of reasonableness" under *Strickland*.
12 Second, the petitioner has failed to show the alleged deficient performance prejudiced his
13 defense so "as to deprive the defendant of a fair trial, a trial whose result is unreasonable." The
14 petitioner must satisfy both prongs to prove his claim of ineffective assistance of counsel, which
15 he has not. The Court finds that the state court's adjudication is not contrary to or an
16 unreasonable application of the federal law.

17 Thus, this Court recommends that habeas relief be denied as to petitioner's first ground
18 for relief (Claim 1).

19 2. *Ground 2 – Ineffective Assistance of Counsel (Claim 2)*

20 In his second ground for relief, petitioner alleges that trial counsel was ineffective when
21 he failed to provide a "defense of another" jury instruction. Dkt. 5 at 7. Petitioner alleges that he
22 was acting in defense of Ms. Hernandez when he shot Mr. Solis. *Id.* Respondent argues that trial
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1 counsel offered an instruction on petitioner's defense – self-defense – and argued in his closing
 2 argument that petitioner also shot Solis in defense of Ms. Hernandez. Dkt. 14 at 24.

3 The Washington Court of Appeals considered this claim in petitioner's first appeal and
 4 concluded the claim was without merit:

5 [D]efense counsel's decision not to propose a "defense of another" instruction to
 6 the jury could have been a tactical decision to focus Contreras's self defense case
 7 theory. For example, Contreras argues in his SAG that he was defending
 8 Hernandez; however, she was a witness for the State who testified that Contreras
 9 did not appear afraid during the shooting and that he said "I just dumped on those
 fools" after the shooting. RP (Jan. 23, 2007) at 290. In light of her adverse
 testimony, defense counsel's decision not to propose this instruction was likely a
 tactical decision to focus on Contreras's stronger self defense theory.

10 Dkt. 15, Exhibit 14 at 14.

11 Petitioner complains that his counsel was ineffective for the absence of the "defense of
 12 other" instruction in the final jury instructions. Respondent notes that although petitioner
 13 personally complained at trial that the proposed instructions were a "fiasco" and stated he was
 14 unsatisfied with them (Dkt. 15, Exhibit 8, at 972-74), he did not complain about the lack of a
 15 separate "defense of another" instruction then. Dkt. 14 at 27-28. Rather, the only specific alleged
 16 problem petitioner identified in the proposed instructions was the potential to mislead the jury to
 17 believe he was only entitled to self-defense if he had been in actual danger of personal injury. *Id.*
 18 at 973. Respondent asserts that Instruction 19 did speak to actual danger being unnecessary for
 19 the use of force to be lawful:

20 A person is entitled to act on appearance in defending himself if that person
 21 believes in good faith and on reasonable grounds that he is in actual danger of
 22 great personal injury, although it afterwards might develop that the person was
 23 mistaken as to the extent of the danger. Actual danger is not necessary for the use
 24 of force to be lawful.

Dkt. 15, Exhibit 59 at Appendix G.

1 Both parties proposed their own jury instructions and discussed them at length with the
2 court. Dkt. 15, Exhibit 7 at 929-67. The defense did not object to the proposed self-defense
3 instruction, *id.* at 940, but did object to the State's proposed "initial aggressor" instruction, which
4 the court declined to give anyhow. *Id.* at 942-43.

5 Ms. Hernandez, testifying as a prosecution witness, stated during trial that petitioner
6 said just prior to shooting, "[t]here those mother fuckers are" and then a short while later
7 petitioner stated, "I just dumped on those fools." Dkt. 15, Exhibit 4 at 289-90. Further, Ms.
8 Hernandez testified that petitioner did not appear to be at all scared and seemed "calm and cool."
9 *Id.* at 290. Ms. Hernandez's testimony, therefore, was not helpful to the "defense of other"
10 theory.

11 In closing argument, defense counsel focused on the issue of self-defense. Despite the
12 testimony from Ms. Hernandez regarding petitioner's lack of fear and statements about Solis and
13 his passenger, defense counsel did state that petitioner's secondary intent was to defend Ms.
14 Hernandez from danger. See Dkt. 15, Exhibit 8 at 1006 ("There can be no doubt that Adrian was
15 defending himself and Regina, his passenger"); *id.* ("Nothing has been offered in evidence to
16 suggest that Adrian was not justified in using a firearm to defend himself and Regina
17 Hernandez."); *id.* at 1008 ("Adrian's only intent was to forestall an attack on himself and Regina
18 and get away."); *id.* at 1011 ("I believe after you consider all the evidence, ... you must conclude
19 that Adrian was defending himself and Regina Hernandez from an obvious and imminent
20 threat"). The prosecutor did not object to defense counsel's references to petitioner's alleged
21 defense of another (Ms. Hernandez) or argue that such actions would not have been the lawful
22 use of force.

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1 The trial court instructed the jury on the lawful use of force and self-defense. *See* Dkt.
 2 15, Exhibit 59, Appendix G, Instructions 18-20. Defense counsel had no objection to the court's
 3 final instructions and did not request any additional ones. Dkt. 15, Exhibit 8 at 972, 974.

4 Respondent argues, as found by the Washington Supreme Court, that petitioner cannot
 5 satisfy the first prong to show ineffective assistance of counsel. The Court agrees. Because this
 6 is a habeas case under 28 U.S.C. § 2254, “[t]he pivotal question is whether the state court's
 7 application of the *Strickland* standard was unreasonable. This is different from asking whether
 8 defense counsel's performance fell below *Strickland's* standard.” *Harrington v. Richter*, 562
 9 U.S. 86, 101 (2011). Under the § 2254(d) standard, petitioner must affirmatively demonstrate
 10 that it was *necessarily unreasonable* for the Washington Court of Appeals to have rejected his
 11 *Strickland* claim. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011).

12 Under this set of facts, petitioner does not show, nor does the Court find, that the state
 13 court confronted facts which were materially indistinguishable from a relevant United States
 14 Supreme Court precedent and arrived at the opposite result or that the state court unreasonably
 15 applied the correct legal standard to the facts of petitioner's case. In sum, petitioner fails to
 16 demonstrate the state court's adjudication of his claim was contrary to or an unreasonable
 17 application of clearly established federal law as determined by the United States Supreme Court,
 18 or to otherwise demonstrate any violation of his constitutional rights. Thus, the Court should
 19 deny habeas relief as to petitioner's second ground for relief.

20 **I. CERTIFICATE OF APPEALABILITY**

21 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
 22 court's dismissal of the federal habeas petition only after obtaining a certificate of appealability
 23 (COA) from a district or circuit judge. A certificate of appealability may issue only if petitioner
 24

1 has made “a substantial showing of the denial of a constitutional right.” See 28 U.S.C. §
2 2253(c)(2). Petitioner satisfies this standard “by demonstrating that jurists of reason could
3 disagree with the district court’s resolution of his constitutional claims or that jurists could
4 conclude the issues presented are adequate to deserve encouragement to proceed further.”
5 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (*citing Slack v. McDaniel*, 529 U.S. 473, 484
6 (2000)). Pursuant to this standard, this Court concludes that petitioner is not entitled to a
7 certificate of appealability with respect to this petition.

CONCLUSION

The Court recommends denying grounds 1 and 2 claims as petitioner has failed to demonstrate that the state court's adjudication of his claims was contrary to, or an unreasonable application of federal law. The Court recommends dismissing without prejudice grounds 3 and 4 as unexhausted. The Court recommends denying the issuance of a certificate of appealability.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on **September 23, 2016**, as noted in the caption.

Dated this 29th day of August, 2016.


J. Richard Creature
United States Magistrate Judge